



EMPLOYMENT TRIBUNALS

Claimant: Ms J Botham

Respondent: Criteria Internet Services Limited

Heard at: Bristol (by video)

On: 2 - 4 October 2023

Before: Employment Judge Bradford

Representation

Claimant: Mr R Cooper (Lay Representative)

Respondent: Mr Lewis-Bale (Counsel)

RESERVED JUDGMENT

1. Having given oral Judgment on 3 October 2023 that:
 - i) The period the Claimant was not employed by the Respondent between 4 April 2022 and 13 May 2022 was due to a temporary cessation of work, in accordance with s212(3)(b) Employment Rights Act 1996 (“ERA”); and
 - ii) The Claimant therefore has the necessary 2+ years continuous employment required to bring a claim for unfair dismissal in accordance with s95 ERA;
 - iii) The claim for constructive unfair dismissal is well-founded.

Judgment having been reserved in relation to Remedy:

2. The Respondent is ordered to pay the Claimant the sum of £10,261.74 comprising:

a)	Basic Award	£3,461.52
b)	Compensatory Award	£6,800.22
3. Of the Compensatory Award, the Prescribed Element is £6,541.26, which relates to the period 18 August 2022 to 31 November 2022. The Respondent is to withhold the Prescribed Element (see Annex) and pay the Claimant the remaining sum, £3,720.48.

REASONS

Background

1. Following her constructive dismissal on 17 August 2022, the Claimant decided to pursue self-employment. She went to the Job Centre at the end of September 2022 when her options were discussed. The Claimant, with support from the Job Centre, including assistance from a work coach, decided to set up a business. She undertook training in November 2022 and is now a Specialist Exercise Instructor, working with older adults in care homes.
2. The Claimant gave evidence that following her period of training in November 2022, she marketed her business in December. She contacted between 20 and 30 care homes and in January, delivered free taster sessions to those who responded to her approach. In February 2023 she started to get paid for this venture. However her earnings have been very low, and indeed, after initially making a small profit, in recent months she had made losses.
3. When asked why she had chosen to become self-employed, the Claimant stated that she felt she could no longer work for someone else in an office due to the traumatic experience she had been through with the Respondent. It was put to the Claimant that she has chosen a niche market, which presents several challenges. The Claimant's response was that due to her experience with the Respondent, she felt that, for herself as a person, it was best to go down the self-employed route.
4. When asked why she did not consider applying for administrative roles, the Claimant stated that she was not prepared to go through a similar experience to that which she had working for the Respondent.
5. On the Claimant's behalf, it was submitted that she had acted reasonably as she had actively sought guidance from the Job Centre and been supported by a work coach. The validity of the job search carried out on behalf of the Respondent (see below) was questionable, given the passage of time since the Claimant's dismissal, as was the suitability of some of the roles.
6. The Claimant had sustained financial loss since the date of her dismissal, which was ongoing. Past losses as set out in the Schedule of Loss were claimed, and future losses in so far as the Tribunal was permitted to award them. It was submitted that in the circumstances of ongoing loss, the Statutory Cap (52 weeks' gross pay) should not apply.
7. The respondent called Mr Harry Durston, Trainee Solicitor at Mogers Drewett LLP. He confirmed, as set out in his witness statement that he had undertaken job searches on a weekly basis between 22 June 2023 and 20 August 2023 for administrator roles within a 10 mile radius of Melksham, which paid in the region of £30,000. The roles he had found were included in the Tribunal bundle.

8. It was submitted on behalf of the Respondent that the Claimant had failed to mitigate her loss. She had been required to do so in accordance with s123(4) Employment Rights Act 1996 ('ERA'). As set out in *Archbold Freightage Ltd v Wilson 1974 IRLR 10, NIRC*, the duty on the Claimant was to act as a reasonable person would do, who had no hope of seeking compensation from their former employer. The job vacancies identified on behalf of the Respondent were referenced, and it was submitted that the Claimant's failure to apply for similar roles meant that she had failed to mitigate her loss.
9. It was submitted that the test the Tribunal should apply was that set out in *Gardiner-Hill v Roland Berger Technics Ltd 1982 IRLR 498, EAT*:
 - (i) what steps were reasonable for the claimant to have to take in order to mitigate his or her loss;
 - (ii) whether the claimant did take reasonable steps to mitigate loss; and
 - (iii) to what extent, if any, the claimant would have actually mitigated his or her loss if he or she had taken those steps.
10. In order to mitigate her loss, the Claimant was required to take reasonable steps, namely, apply for other posts as an administrator. Administrative roles were readily available, and as such, it would be appropriate for the Tribunal to award loss of earnings for two months. It was submitted that the Claimant should have been employed by the end of October 2022.
11. It was further submitted that whilst the Claimant says she has attempted to mitigate her loss, self-employment in her chosen market was unreasonable. She had outlined some of the challenges in her evidence. Mitigation required her to look for similar administrative roles to that in which she had been employed. If the Tribunal was not with the Respondent on that, then in the alternative, it was not reasonable that it took the Claimant three months from completing her training to start earning money. If the Tribunal were to find self-employment reasonable, then the losses should be limited to three months, to the end of November 2022.
12. In relation to the Statutory Cap, which the Claimant's representative had submitted should not apply, there was no basis for the Tribunal to disapply it in accordance with s124 ERA.

Issues

- i) What basic award is payable to the Claimant?
- ii) If there is a compensatory award, how much should it be? The Tribunal will decide:
 - What financial losses has the dismissal caused the Claimant?
 - Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
 - If not, for what period of loss should the Claimant be compensated?

Decision

13. The Claimant was aged 57 at the date of dismissal and had been employed for more than 4 years.

Basic Award

4 years x 1.5 weeks x £576.92 = £3,461.52

14. Moving to the compensatory award, the Claimant had provided a Schedule of loss, according to which, losses to the date of the hearing, having deducted Universal Credit and income from self-employment, total £25,633. In order to determine the appropriate compensatory award, I need to consider whether the Claimant has mitigated her loss. This is a statutory requirement, as set out at s123(4) ERA:

'In ascertaining the loss [sustained by the claimant] the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland'.

15. The test is whether the employee's conduct in pursuing a particular source of income, is reasonable on the facts of the case - *Yetton v Eastwoods Froy Ltd* 1966 3 All ER 353, QBD.

16. The burden of proof is on the Respondent. It is for the Respondent to prove that the Claimant acted unreasonably.

17. I will therefore consider the three step test, set out above, as laid out in the case of *Gardiner-Hill* (above).

What steps were reasonable for the Claimant to take to mitigate her loss?

18. A reasonable person in this context, is one who had no hope of seeking compensation from their employer - *Archbold Freightage Ltd v Wilson* (above). The test is an objective one, with a subjective element. Was it reasonable for the Claimant to make the choice she did? The Claimant's case is that it was reasonable to pursue self-employment, as due to her experience working for the Respondent, she no longer wished to work in an office. This is not inherently unreasonable. However, pursuing this avenue alone, when it was not going to bring in income for a number of months, and then only a very small income in the 'start-up phase' was not, objectively reasonable. I am conscious that the Claimant's personal circumstances and choice are relevant, and indeed important factors. The Claimant may have been content to live on little money, but that is not consistent with taking all reasonable steps to reduce her loss. Whilst the Claimant bears no burden of proof, that does not equate to a requirement on the Tribunal to accept her subjective view.

19. The Claimant relies heavily on the impact she says working for the Respondent had on her, and that meant that her decisions to; a) no longer work in an office, and b) pursue self-employment, were reasonable. In *Austin v Leeds Teaching Hospitals NHS Trust* ET Case No.1801339/17 the subjective element to the objective test was dealt with. There, the Claimant was said to have a psychological disability, which included a belief that her attempts to regain employment in the public sector were being hampered by prejudice about her, negative beliefs about her capacity for work and other paranoid ideas. The Tribunal said

that her decisions affecting mitigation of loss had to be viewed through the lens of what is reasonable for someone with a pre-existing mental health condition who entertains paranoid and negative thinking concerning the respondent and other similar public sector employers.

20. So that leads me to the question – were the steps taken by the Claimant steps that would have been taken by a reasonable employee who no longer wished to work in an office? I find that a reasonable employee would have applied for non-office based roles initially. However, due to the need to earn a living, a reasonable employee who was not successful initially in securing an alternative type of work, would have sought an office based position, so that they had an income, whilst continuing to seek an alternate type of employment or indeed pursue plans for self-employment. It is not uncommon for people to explore self-employment whilst remaining employed, given the risks involved and likelihood of very small profits initially.

Did the Claimant take reasonable steps to mitigate her loss?

21. In considering this second question, I bear in mind that she has secured another source of income, but at a significantly lower level.
22. I am assisted in this to an extent by the research carried out by Mr Durston. As submitted on behalf of the Claimant, the advertised positions significantly post date her dismissal. I also accept the Claimant's submission that some of the roles, (such as HR and Office Manager), are likely to have required a level of specialist skill, that the Claimant appears not to hold. That said, there were a number of general administrative roles available at the time the search was carried out, and I find, on the balance of probabilities, that similar and hence suitable roles would have been available for the Claimant to apply for in the autumn of 2022.
23. I find that the Claimant acted unreasonably in failing to apply for employed roles, as I find, given the support she received from the Job Centre, she knew or should have known that her self-employment was not going to give her an income for a number of months, and then, at least initially, a significantly lower income than that which she had been earning.

Extent to which loss would have been mitigated with reasonable steps

24. The third question is the extent to which the Claimant would have mitigated her loss had she taken those steps. I need to establish the date on which she would, acting reasonably, have secured the same or better paid employment - *Glasgow City Council v Rayton EAT 0005/07*. The Claimant's individual characteristics, including her age, are relevant here. Equally, the Claimant referred in her evidence to having worked in different types of office based role in the past, and that would, I find, have gone in her favour had she sought an office based role. The Respondent has submitted that the Claimant, acting reasonably, would have found alternative work paying a similar salary within 2 months. Alternatively, given the Claimant's unreasonable pursuance of self-employment, then the compensatory award should be limited to three months.
25. Given the Claimant's clear desire to have a change of career, and given my finding that it would therefore have been reasonable to explore self-employment or apply for non-office based roles initially, then I find it reasonable to allow the Claimant around 6 weeks, to the end of

September 2022, to explore alternative types of employment/work. If she was not succeeding, and having appreciated that self-employment was unlikely to give an income in the short term (she had received advice from the Job Centre), then the next reasonable step would have been to apply for office based roles. The Claimant, with a duty to mitigate, should have taken a general administrative role, and continued to pursue alternative avenues to earn a living if that was what she wished for longer term. I find that in a further period of two months, taking her to the end of November 2022, the Claimant should have secured an administrative role paying a similar salary to that which she earned with the Respondent. The evidence is that there were a number of such roles available a year on. Whilst I have not been provided with evidence of jobs from the time the Claimant should reasonably have been seeking employment, nor has there been any suggestion that the labour market was different at that time. I find that there were, at any one time, a range of non-specialist administrative jobs available.

Compensatory award

26. Immediate loss of earnings

18 August 2022 – 30 November 2022 = 14.96 weeks

I have used the July payslip to calculate net weekly pay, as every other month had some adjustment.

$£1937 \div 4.43 \text{ weeks} = £437.25/\text{week}$

$14.96 \text{ weeks} \times £437.25 = £6,541.26$

Pension – employer's contribution

3% of gross salary x 14.96 weeks

$3\% \text{ of } 30,000 = £900 \div 52 = £17.31/\text{week}$

$14.96 \text{ weeks} \times £17.31 = £258.96$

Total Compensatory award: £6,800.22

27. I make no award for loss of statutory rights as the Claimant does not intend to work in an employed role, and hence there is no detriment as she will not require the protection of such rights going forward. Nor have I been provided with evidence of expenses incurred by the Claimant in seeking a new role.

28. I make no award for loss from December 2022 onwards, or indeed future loss, as I have found the Claimant acted unreasonably in solely pursuing her chosen form of self-employment.

29. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 apply to this award. The award includes the sum of £6,541.26 in respect of pay from the date of dismissal until 30 November 2022, the date by which, acting reasonably, the Claimant would have secured an equivalent employed role. The Parties'

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attention is drawn to the Annex to this Judgment, which sets out what the Respondent is required to do.

Employment Judge Bradford

Date: 30 October 2023

Reserved Judgment & Reasons sent to the Parties:

20 November 2023

FOR EMPLOYMENT TRIBUNALS

ANNEX TO THE JUDGMENT

Recoupment of Jobseeker's Allowance, income-related Employment and Support Allowance, universal credit and Income Support

The tribunal has awarded compensation to the claimant but not all of it should be paid immediately. This is because the Department for Work and Pensions (DWP) has the right to recover (recoup) any Jobseeker's Allowance, income related Employment and Support Allowance, universal credit or Income Support which it paid to the claimant after dismissal. This will be done by way of a Recoupment Notice which will be sent to the respondent usually within 21 days after the tribunal's judgment was sent to the parties.

The tribunal's judgment should state the total monetary award made to the claimant and an amount called the prescribed element. Only the prescribed element is affected by the recoupment Notice and that part of the tribunal's award should not be paid until the recoupment Notice has been received.

The difference between the monetary award and the prescribed element is payable by the respondent to the claimant immediately.

When the DWP sends the recoupment Notice, the respondent must pay the amount specified in the Notice by the department. This amount can never be more than the prescribed element of any monetary award. If the amount is less than the prescribed element, the respondent must pay the balance to the claimant. If the Department informs the respondent that it does not intend to issue a Recoupment Notice, the respondent must immediately pay the whole of the prescribed element to the claimant.

The claimant will receive a copy of the Recoupment Notice from the DWP. If the claimant disputes the amount in the Recoupment Notice, the claimant must inform the DWP in writing within 21 days. The Tribunal has no power to resolve such disputes which must be resolved directly between the claimant and the DWP.